IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32710

STATE OF IDAHO,	)	
	)	**2008 Opinion No. 46**
Plaintiff-Respondent,	)	
	)	**Filed: May 30, 2008**
v.	)	
	)	**Stephen W. Kenyon, Clerk**
VANCE A. WATKINS,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Phillip Becker, District Judge.

Judgment of conviction for lewd conduct with a minor child under sixteen, vacated, and case remanded.

Molly J. Huskey, State Appellate Public Defender; Erik R. Lehtinen, Deputy Appellate Public Defender, Boise, for appellant. Erik R. Lehtinen argued.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent. Daniel W. Bower argued.

LANSING, Judge

Vance A. Watkins appeals from his conviction for lewd conduct with a minor child under sixteen, Idaho Code § 18-1508. Watkins contends that the district court violated the hearsay rule as well as Watkins' constitutional right to confront adverse witnesses by allowing the State's expert witness to testify about DNA testing that she did not conduct. The witness's testimony was based upon information she obtained through conversations with her colleague who performed the actual tests but did not testify, and upon the contents of the colleague's notes. We conclude that the evidence, as presented, was inadmissible hearsay and that the error was not harmless. We therefore vacate the judgment of conviction and remand for a new trial.

I.
BACKGROUND

Watkins was charged with lewd and lascivious conduct with a child under sixteen, I.C. § 18-1508, for having oral, anal, and genital contact with his six-year-old daughter, R.W. A detective with the Nampa Police Department obtained a search warrant for Watkins' home and seized, among other things, several pairs of child's panties and a used condom. Oral swabs from R.W. and from Watkins were also taken. The detective sent this and other physical evidence to the Arkansas laboratory of Identigenetix, Inc., for analysis and DNA testing.

The person who tested the evidence, Kermit Channell, did not testify at the trial. Instead, Dr. Carla Finis, a DNA forensic consultant and the owner of Identigenetix, was called by the State as a DNA expert.[1] Over the defense's hearsay objections, Finis was allowed to testify, on the basis of Channell's notes and her conversations with Channell, about how the materials were handled, what was tested, how it was tested, where semen and DNA samples were found and related matters. Ultimately, Finis testified that the DNA sample from semen found on one pair of R.W.'s panties matched DNA from Watkins' oral swab, that DNA from inside the condom matched Watkins' DNA, and that DNA on the outside of the condom matched that from R.W.'s oral swab. Watkins appeals, contending that admission of this testimony violated the hearsay rule and Confrontation Clause of the Sixth Amendment to the United States Constitution.

II.
ANALYSIS

As a preliminary matter, we must address the State's contention that we should not address the hearsay issue because Watkins raised it for the first time in his appellate reply brief, which is not allowed. A reviewing court ordinarily considers only the issues presented in a party's opening brief on appeal because those are the arguments and authority to which the respondent has an opportunity to reply in the respondent's brief. *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005). In this case, however, after the initial appellant's, respondent's

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[1] At the time of trial, Finis was unavailable to testify in person because she had suffered a broken hip and was hospitalized in Boise. The parties took a videotaped deposition of Finis at the hospital, with the trial judge presiding to rule on objections. The video was later played at trial.

and reply briefs were filed, this Court ordered supplemental briefing due to the deficiency of the appellant's briefing on the Confrontation Clause issue. We ordered appellant's counsel to submit a supplemental appellant's brief on that issue and allowed the opportunity for counsel to also address the hearsay issue in the supplemental appellant's brief, which was done. The State was allowed to file a supplemental respondent's brief addressing both of these issues. Accordingly, the hearsay issue has been fully briefed, with the State having received a full opportunity to respond to Watkins' arguments. Therefore, Watkins' failure to raise the hearsay argument in his opening appellant's brief is a moot point.

The State also argues that the hearsay issue cannot be addressed because Watkins did not properly preserve his hearsay challenges by timely objection during Dr. Finis' testimony. We disagree. At the outset of Finis' testimony regarding the testing Watkins made a hearsay objection to her recitation of information she was reading from Channell's notes or that she had received from him. He subsequently objected that her testimony was not based on personal knowledge, and near the close of her testimony moved to strike the hearsay testimony that had been elicited. Each time, his objection was overruled. We conclude that the hearsay issue has been adequately preserved for appeal.

Watkins argues that Finis' recitation of the content of Channell's notes and her repetition of statements he made to her were inadmissible hearsay. Hearsay is an out-of-court statement, whether written or oral (and can include nonverbal conduct if it is intended as an assertion), which is offered into evidence to prove the truth of the matter asserted. Idaho Rule of Evidence 801. Unless it falls within an exception specified in the rules of evidence, hearsay is not admissible. I.R.E. 802. Many reasons have been cited for this principle, which is universally recognized in American courts, that hearsay is generally inadmissible. Among these are the concerns that an out-of-court declarant's statement was not made under oath; that the jury does not have an opportunity to observe the out-of-court declarant's demeanor, which may shed light on credibility; that there is danger that the witness reporting the out-of-court statement may do so inaccurately; and that the opposing party has no opportunity to cross-examine the absent declarant. *See* 2 MCCORMICK ON EVIDENCE § 245 (Kenneth S. Broun, ed., 6th ed. 2006).

The State first argues that the hearsay rule is inapplicable because "there was no out-of-court statement offered into evidence." This argument is frivolous. Finis not only testified about the content of Channell's statements to her during conversations, but also repeatedly referred to

Channell's notes in order to answer questions about his handling and testing of the evidence. Whether her testimony conveyed direct quotes of Channell's statements or notes is of no consequence because "[t]estimony, which conveys the substance of an out-of-court statement for the truth of the matter asserted, is properly characterized as hearsay even though the statement is not directly repeated." *State v. Agundis*, 127 Idaho 587, 596, 903 P.2d 752, 761 (Ct. App. 1995). *See also State v. Vondenkamp*, 141 Idaho 878, 887, 119 P.3d 653, 662 (Ct. App. 2005); *State v. Gomez*, 126 Idaho 700, 704, 889 P.2d 729, 733 (Ct. App. 1994). As expressed in MCCORMICK, § 249, at 137, "[W]hen offered as proof of the facts asserted, testimony regarding 'information received' by the witness and the results of investigations made by other persons are properly classified as hearsay." Here, Finis repeatedly testified to the substance of Channell's notes and oral statements. Thus, hearsay was elicited, and we must turn to consideration of the hearsay exceptions urged by the State.

The State contends that Finis' hearsay testimony was admissible under the business record exception to the hearsay rule, I.R.E. 803(6), because it was derived from Channell's notes or report. This argument is without merit for a number of reasons. First, Rule 803(6) defines evidence that is subject to the business records exception in part as "a memorandum, report, record, or data compilation, in any form . . . ." Thus, a "business record" is inherently a document, electronic record, or the like. Here, the State did not offer into evidence either Channell's notes on which Finis was basing her testimony or any written report about the laboratory tests. There was simply no writing or other record placed into evidence and therefore no business record that could fall within this hearsay exception.

Second, some of Finis' testimony was not derived from Channell's notes but rather relayed what Channell told Finis orally. The State has offered no explanation of how Channell's oral statements could be considered a business record.

Finally, if the records themselves had been proffered into evidence with an appropriate foundation laid, they would not have been admissible in this case because I.R.E. 803(8), the hearsay exception for public records, places a limitation on the admission of certain types of records when they are offered by the government. Although Rule 803(8) provides that some public records are excepted from the rule excluding hearsay, it also specifies:

> The following are not within this exception to the hearsay rule: . . . (B) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (C) factual findings

> offered by the government in criminal cases; (D) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

In *State v. Sandoval-Tena*, 138 Idaho 908, 911-12, 71 P.3d 1055, 1058-59 (2003), our Supreme Court held that because a police crime lab report was expressly made inadmissible under these provisions of Rule 803(8), the report likewise was not admissible under the business records exception of Rule 803(6) because "the crime lab report should either be excluded under both rules or admissible under both rules." *Id.* at 912, 71 P.3d at 1059. *See also* MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 7047, at 580-87 (interim ed. 2006). The portion of Channell's notes documenting where DNA evidence was found on the tested items and the results of the tests are investigative reports and factual findings prepared for a law enforcement agency. They are therefore excluded by Rule 803(8)(B), (C), and (D), and are consequently not admissible as a business record under Rule 803(6).

For all of the foregoing reasons, Finis' challenged testimony, when proffered by the State, was not made admissible by the business records exception to the hearsay rule.

The State next argues that Finis' hearsay testimony was admissible under I.R.E. 703 which, under limited circumstances, authorizes a court to allow otherwise inadmissible evidence if it was reasonably relied upon in the formation of an expert witness's opinion. Rule 703 says:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

The last sentence of the rule makes clear that otherwise inadmissible evidence may not be admitted through an expert's testimony unless it has probative value in assisting the jury to evaluate the expert's opinion and this probative value substantially outweighs any prejudicial effect.[2] This provision does not validate the challenged testimony of Dr. Finis. The hearsay that

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[2] Even before the last sentence was added to Rule 703 in 2002, bringing our rule into conformity with the corresponding federal rule, we held that Rule 703 did not allow an expert who relied upon hearsay in formulating an opinion to testify to the hearsay information at the

was placed in evidence through her was plainly not offered for the limited purpose of assisting the jury to evaluate Dr. Finis' opinion. The State did not indicate that the testimony was proffered for this limited purpose, the trial court did not make the requisite finding that the probative value for such purpose would outweigh prejudicial effect, and the jury was given no limiting instruction on the use of the evidence. Rather, the State relied upon the hearsay evidence for the truth of the statements in Channell's notes concerning the chain of custody of the evidentiary items, the testing methods, and the areas on the condom and panties on which Watkins' DNA and the victim's DNA were found. Finis' testimony was the *only* evidence introduced by the State concerning these points, which were critical to link the tested DNA to Watkins and R.W. and to otherwise lay a foundation for admission of the test results.

Although Finis was qualified by her expertise to testify, for example, that test results showed that biological material in test A was a DNA "match" to biological material in test B, and could arguably testify in a general manner about standard procedures used at the lab, her testimony concerning what items were tested for DNA in this case, the location on these items where tested DNA was found, and the chain of custody for that evidence was based entirely on hearsay and should not have been allowed. The State's presentation through Dr. Finis of information about Channell's activities deprived Watkins of any opportunity to cross-examine the only individual with personal knowledge of how the evidence was handled and tested.

Error in the admission or exclusion of evidence will not result in a reversal if the error was harmless beyond a reasonable doubt. *State v. Field*, 144 Idaho 559, 572, 165 P.3d 273, 286 (2007); *Gomez*, 126 Idaho at 705, 889 P.2d at 734. We cannot conclude, however, that the error was harmless in this case. The inadmissible hearsay presented to the jury included Finis' testimony that Watkins' semen was found on the child's panties, and that both Watkins' and the child's DNA was found on a used condom. Although the child testified that Watkins had molested her, other trial evidence also indicated that she had made similar, and unfounded,

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behest of the party who proffered the expert. *State v. Scovell*, 136 Idaho 587, 592-93, 38 P.3d 625, 630-31 (Ct. App. 2001). In *Scovell* we held that the pre-amendment version of the rule addressed only the type of information upon which an expert could rely in developing opinions or inferences and did not contain any provision for automatic admission into evidence of otherwise inadmissible material the expert relied upon.

allegations against her uncle; and a medical examination of the child's vagina and anus returned "no definitive abnormal findings." We cannot confidently say that, based on the child's testimony alone and without the inadmissible hearsay from Dr. Finis, the jury would have found Watkins guilty. Because we find reversible error on this ground, we do not address whether admission of the challenged testimony also violated the Confrontation Clause.

The judgment of conviction is vacated and this case is remanded for a new trial.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**